Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES M. FRYE,

Petitioner,

V.

EXCELSIOR COLLEGE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Charles M. Frye, *Pro Se*
6444 East Spring Street No. 134
Long Beach, California 90815

(714) 499-3823

QUESTIONS PRESENTED

1. Should a "Fair Use" defense be defeated on the basis of a "presumption of harm" when there has been no market substitution and the copyright owner granted permission to the Internet world to download and print any number of copies of a copyrighted work without any articulation as to restrictions, fees, licenses, limitations, attributions, expectations of use, directions, or reservation of rights?

2. Does the Due Process principle prohibit a grossly excessive statutory damage award, (punitive-to-compensatory ratio of 150,000:0) even though the jury award itself falls within the *minima* and *maxima* ($30,000 to $150,000) permitted by the particular statute (Copyright Act)?

3. Does Federal Rules of Civil Procedure 26 and 34 require the actual production of copies of documents as opposed to permitting the "representative to inspect, copy..."?

4. If a party admits in the appellee brief that the evidence placed on the overhead projector for jury viewing was fabricated and the testimony regarding it was false, should the "magnitude" of importance to the case and the "impact" of the evidence on the jury be presumed?

PARTIES TO THE PROCEEDING

Charles M. Frye is the defendant – appellant below and Petitioner for this proceeding.

West Haven University, Inc. – defendant in district court action, not an appellant below nor a petitioner for this proceeding.

Professional Development Systems School of Health Sciences, Inc. – defendant in district court action, not an appellant below nor a petitioner for this proceeding.

Excelsior College is the plaintiff – appellee below and is a Respondent under Rule 12.6.

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OPINION BELOW

The unreported "Final Judgment and Permanent Injunction" of the United States District Court, Southern District of California was entered on March 23, 2007. (App. 1 - 11).

The "Order" affirming the Final Judgment and Permanent Injunction of the United States District Court, Southern District of California was entered on June 14, 2007. (App. 12 - 15).

The unreported "Memorandum" of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirming decision of the district court was entered September 1, 2009. (App. 16 - 21).

The unreported "Order" of the Ninth Circuit denying Petitioner's motion for reconsideration was entered September 22, 2009. (App. 22).

BASIS FOR JURISDICTION

The Ninth Circuit issued its "Memorandum" of opinion denying Respondent's appeal of the district court's decision on September 1, 2009. Petitioner timely filed a motion to reconsider. The motion was denied on September 22, 2009. This Court has jurisdiction to review the Ninth Circuit's denial of appeal and petition for review pursuant to 28 U.S.C. § 1254. The Ninth Circuit had jurisdiction over the appeal of the district court's decision

pursuant to 28 U.S.C. § 1291. The District Courthad original subject matter jurisdiction over federal claims pursuant to 28 U.S.C. §§ 1331 and 1332.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to U. S. Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act, 17 U.S.C. §§107 and 504, are reprinted below:

17 U.S.C. §107. Limitations on exclusive rights: Fair use

"Notwithstanding the provisions of sections 106 and 106A [17 USC § §106 and 106A], the

fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

17 U.S.C. § 504. Remedies for infringement: Damages

(a) "In General. - Except as otherwise provided by this title, an infringer of copyright is liable for either - the copyright owner's actual damages and any additional profits of the infringer...or statutory damages, as provided by subsection (C).

(1) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000."

FEDERAL RULES OF CIVIL PROCEDURE

Relevant provisions of Federal Rules of Civil Procedures (Rule) 26, 34, and 37 are reprinted below:

Fed. R. Civil Procedure 26(a)(1)

"Under Rule 26 (a)(1) a party has a duty to make initial disclosures *** without waiting for discovery (1) the name of individuals "likely to have discoverable information...";
(2) "a copy – or a description by category and location — of all documents *** the

disclosing party has in its possession, custody, or control and may use to support its claims or defenses"; (3) "a computation of each category of damages claimed by the disclosing party*** and (4) "for inspection and copying ***any insurance agreement..."

Fed. R. Civil Procedure 26(e)(1)

"A party who has made a disclosure under Rule 26(a) — or who has responded to a[] *** request for production, *** — must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete... or (B) as ordered by the court."

Fed. R. Civil Procedure 34

"A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, ***(A) any designated documents..."

Fed. R. Civil Procedure 37(c)(1)

"If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information *** to supply evidence *** at a trial, unless the failure was substantially

justified or is harmless."

STATEMENT OF THE CASE

A. BACKGROUND:

In 2002, Excelsior College ("Excelsior," "Plaintiff," or "Respondent") was suspected of being out of compliance with existing laws relative to its nurse training program and hearings were held by the California Board of Registered Nursing ("Board") relative to this concern. Petitioner Charles M. Frye ("Petitioner" "Petitioner Frye," or "Frye"), a registered nurse and educator, was invited to apprise the Board of his knowledge of Excelsior College's training program. This knowledge was gained by his offering the RN Fast Tracking Program which required his students to take certain examinations offered by Excelsior. Essentially, students would use Excelsior's program as the vehicle for earning a degree but would learn the arts and sciences of being a registered nurse through the RN Fast Tracking Program. Without the RN Fast Tracking Program students would advance to registered nurse status without a day of classroom or clinical training. The process was explained in the testimony of Marianne Barrinuevo, RN, MSN:

> Q. Were you ever offered clinical training by Excelsior College?
> A. No, I was not.
> Q. Did you learn anything in the RN Fast

Tracking Program?
A. I did.---Everything that has anything to do with nursing.

Petitioner Frye had training facilities throughout California and other states and offered training on the Internet. Despite this widespread offering, Excelsior discouraged students from enrolling in the RN Fast Tracking Program as it highlighted the absence of a basic training program within Excelsior. This was confirmed by the testimony of Excelsior's Dean of Nursing, Dr. Bridgett Nettleton, during her cross examination:

Q. (By Mr. Frye) So if Excelsior College doesn't evaluate test preparation institutions such as my RN Fast Tracking Program, what basis does it have to discourage students from enrolling in the program?

A. We feel it's in the best interest of the students to work directly with the college

As a result of the Board's investigation and Frye's adverse testimony, a determination was made that Excelsior's program was not in compliance with the law and its approval was revoked. Excelsior did take an appeal but the decision of the Board was affirmed by the California Court of Appeal, Third Appellate District:

> California has the right and responsibility to regulate nursing within the state for the protection of its citizens...The record reveals numerous attempts by the Board to assist Excelsior with developing strategies for coming into compliance with California's requirements. Excelsior chose not to do so.

B. DISTRICT COURT ACTION:

Following Petitioner Frye's contact with the Board, Excelsior filed a lawsuit alleging a plethora of claims against him and two corporate entities he owned 100% stock in: Professional Development Systems School of Health Sciences, Inc. and West Haven University, Inc. The meritless of its claims is best demonstrated by the fact that of the thirty claims Excelsior filed against all the defendants in February 2003, it only prevailed by summary judgment on three, and those involve the Content Guides at issue in this appeal. Notably, on three occasions Excelsior did not deny that the lawsuit leveled against Petitioner Frye was in retaliation for him giving adverse testimony before the Board.

Surreptitiously, after filing its original complaint in February 2003, Excelsior implemented a policy requiring test takers to sign a Nondisclosure Agreement prior to taking its examinations. It then amended its Complaint and added misappropriation of trade secret claim. From that point on it never let the court, jury, or defendants know it was a new policy, projecting

instead that it had been a long standing practice for at least "14 years." Without the contrived Nondisclosure Agreement, Excelsior would have had to *admit* that it released its trade secrets to hundreds of thousands of test takers each year. Judgment should be reversed as how can Excelsior now claim, as it did in the appellee brief, the Nondisclosure Agreement is irrelevant?

> If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984)

In September 2005, all parties filed for summary judgment. The district court granted summary judgment on the three Content Guides.

C. POST TRIAL PHASE:

When Petitioner filed a motion for a new trial based on the deceptions and misrepresentations carried out by Excelsior, he did not have the hard evidence to prove Excelsior fabricated claims relative to the Nondisclosure Agreement. Suspicions were raised by the fact that four of Excelsior's graduates testifying for defense had never heard of the Nondisclosure Agreement and claimed they never signed such an agreement, notwithstanding the testimony of Excelsior's employee witnesses. Excelsior defeated the motion

for a new trial by claiming its witnesses' testimony was "impeccably honest and true." After Frye filed his motion for a new trial and before Professional Development Systems School of Health Sciences filed its own, hard evidence was discovered that the Nondisclosure Agreement came into existence after it filed its complaint and therefore irrelevant as to any issue before the jury.

D. APPELLATE PHASE:

The appellate review was conducted on the pleadings. Within the appellee brief Excelsior admitted to wrongdoing but projected that Frye had failed to establish how he was prejudiced by issues relative to the Nondisclosure Agreement. The Ninth Circuit found that "Frye fail[ed] to meet his burden of showing that he "could not have discovered the evidence sooner through the exercise of reasonable diligence, and that the new evidence is of such magnitude that it would likely have changed the outcome of the case." (Citation omitted).

SUMMARY OF ARGUMENT

This case raises issues of national importance, conflicts between circuits, strong departures from previous decisions of this Court and the Federal Rules of Civil Procedure.

1. The Court is requested to review an issue that may be of first impression and one that is not

only extremely important to our nation as a whole, but to the judiciary specifically as it is the one being called upon to protect property rights in copyrighted material that the owner has chosen not to protect. This is especially true of individuals who post their copyrighted work on the Internet and permit anyone with print capability to make copies of the documents without reservations of rights or restrictions as to the number of copies that can be made.

2. The Court is also requested to review another issue that may be of first impression as well. Specifically, the issue involves statutory damages for willful copyright infringement. The Ninth Circuit's position is that as long as the jury award falls within the *minima* and *maxima*, the award stands. The question presented to the Court is whether the Due Process principle for "grossly excessive" statutory damages requires courts to make adjustments when the jury award exceeds the bounds of reason.

3. The next issue may be of first impression as well, yet involves addressing the plain language of Federal Rules of Civil Procedure 26 and 34. The district court imposed a Rule 37 sanction for Frye's failure to provide actual copies of books he had listed as trial exhibits. Respondent were provided a listing of the books at issue a year earlier per the order of the magistrate handling discovery issues. Although Respondent was invited to inspect on site, it chose not to. Just prior to trial it brought a

motion in *limine* resulting in the striking of all the documents and books on the list previously provided.

4. The fourth issue involves attorney misconduct and the Ninth Circuit entered an opinion that conflicts with its own precedence and this Court's *Hazel-Atlas Glass Co. v. Hartford-Empire Company* decision. Essentially, faced with catastrophic case failure, Excelsior's counsel, (in concert with Excelsior) simply altered the course of the case with contrived testimony and fabricated evidence. The evidence and the testimony undoubtedly permeated the entire trial and judgment in *toto* should be set aside.

Excelsior discounts the relevance of the fabricated evidence. The specific conduct and effort to minimize the wrongdoing contrast with Hazel-Atlas and its principle has stood the test of time and it is most relevant to this case:

> "Upon the record, the Circuit Court of Appeals had the power and the duty to vacate its 1932 judgment and to give the District Court appropriate directions. [Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 247 (1944)].
>
> (a) Even if Hazel failed to exercise due diligence to uncover the fraud, relief may not be denied on that ground alone, since public interests are involved. [Id. @ 246].

(b) In the circumstances, Hartford may not be heard to dispute the effectiveness, not to assert the truth, of the article." [Id. @ 247].

ARGUMENT

A. If the copyright owner grants permission to download and copy, is there a right to protect?

In addressing the issue presented for the Court, it is helpful to focus first on what the copyright owner did; discuss its wider implication; and then apply the law to the facts presented in this case.

In a very real sense, when an owner places a copyrighted work on the Internet for access by anyone with an Internet connection, a reasonable assumption could be made that there is greater value to the owner for it being available to the public on the Internet (for viewing) than being controlled or shielded in some fashion, such as within a book that can be sold for profit or access to viewing restricted by a fee or non-fee membership status.

The value of posting the work on the Internet could also be financial such as with marketing, self-adulation, complaining, praising others, promoting a business, or endless number of other reasons. But it is the owner who accepts the *tradeoff* he receives for the copyrighted work he shares with the world

freely. The issue would be different if the author provided books free and it was the books themselves that served as the "original" for the copies being made. Here the copyright owner is granted permission to make an untold number of original like copies from an image appearing on a monitor.

In the instant action, Excelsior provided such invitation to Frye, a member of the class it was trying to reach (i.e. administrator of a college):

> If you are a faculty member or administrator of a college or university and want to make flexible alternative study options available to your students, Excelsior College Examinations can be very helpful. We encourage you to obtain copies of all relevant content guides. They will provide you and your institution with an objective basis for making decisions about awarding credit.

It also aimed a general invitation to the world: "Preparing for the Examination," "You can also download and print content guides from our website at www.excelsior.edu."

Considering this is an offering with no reservations of rights or restriction whatsoever, is there a property right worth protecting when the copyright owner has not taken the step of stating: "You are invited to make a single copy for your own personal use"?

For purpose of a *shock* illustration, an Internet user could print 266 million copies and distribute them to every child, woman, and man in the United States and be in full compliance with the laws of copyright and the legal permission granted by the copyright owner. Yet, if that same person decided to make a copy from one of the copies, liability would attach for willful copyright infringement and subject the doer to statutory damages in the amount of $30,000 to $150,000.

The facts surrounding the infringement claim against Petitioner, to a large extent, are not in dispute. In short, Petitioner, while seeking approval to offer a nursing degree program through West Haven University, requested permission from the licensing authority to conduct the actual training for enrolled students but allow them the option of taking a comparative examination offered by Excelsior College. Students taking this option would be required to pay Excelsior's testing fee of $880.

As part of the approval process, the licensing authority requested to see the actual examinations that would be administered to the students for a *fit for purpose* analysis. Since Petitioner did not have the actual examinations he asked if he could submit Content Guides in lieu of the examinations, as they contained study areas and sample questions. The state accepted the offer. In the end, the licensing authority did not approve of the

proposal. It is important to note that another program was submitted without reference to Excelsior or its examinations and the degree program was approved. The importance lies in the fact that there was no room for "presumption" of market harm as found by the district court.

There never was a need to use the "Content Guides" beyond having them assessed by the licensing authority.

The exclusive rights afforded the copyright owner under 11 U.S.C. § 106 are subject to § 107 "Limitations on Exclusive Rights: Fair Use." A person who makes fair use of a copyrighted work is not an infringer even if such use is otherwise inconsistent with the exclusive rights of the copyright owner.

In the "Fair use" analysis conducted by the district court, only "the nature of the copyright work" was found in Petitioner's favor. The court gave its reasoning for finding for Respondent as to the other three factors:

> Although indirectly, [Petitioner Frye] used Excelsior's Content Guides in order to ultimately achieve commercial gain. The likelihood of market harm may therefore be presumed.

Respectfully, it would appear that the district court put too much stock in "presumption of market

harm" as the facts clearly demonstrated there was no harm nor potential for it.

> The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." Section107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. Nimmer § 13.05[A][4], p. 13-102.61 (footnote omitted); accord *Harper & Row*, 471 U. S., at 569; Senate Report, p. 65; *Folsom* v. *Marsh*, 9 F. Cas., at 349. The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, *supra*, at 568.

The Supreme Court described Factor 4 as the "single most important element of fair use," Harper & Row, 471 U.S. at 566, considering that a primary goal of copyright is to ensure that "authors [have] the opportunity to realize rewards in order to encourage them to create." Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. at 1124. By contrast, "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to

protect the author's incentive to create." Sony, 464 U.S. at 450. (Emphasis added).

> The issue should not be "whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [upon] whether the secondary use usurps the market of the original work." NXIVM Corp. v. The Ross Institute, 364 F.3d 471, 482 (2nd Cir. 2004).
>
> The fair use doctrine protects against a republication which offers the copyrighted work in a secondary packaging, where potential customers, having read the secondary work, will no longer be inclined to purchase again something they have already read." Sundeman v. The Seajay Soc'y, Inc., 142 F.3d 194, 207 (4th Cir. 1998) (internal quotation marks omitted).

It was in Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994), that this Court reversed the Sixth Circuit Court of Appeals for, among other reasons, holding that a commercial use is presumptively unfair. 510 U.S. at 583-84. This is essentially what the district court did in the instant action.

As clearly stated in the opposition to Excelsior's (successful) motion for summary judgment, submitting the Content Outlines to the state agency had no effect on the market because:

1. There was no market substitute;

2. The use closely paralleled the use envisioned by Excelsior since it "encourage" educational administrators to make copies";

3. Presumption of harm should never be applied when it is known that the market could not be harmed.

4. Additionally, it seems that this issue should be resolved under state contract law as a breach of implied contract, if anything. Under California Code of Civil Procedure § 1621, "An implied contract is one, the existence and terms of which are manifested by conduct." This would also place a curb on *blow-out* damage awards.

In summary: A decision should be made by this Court as to whether there is a need for court intervention to protect rights when the copyright owner offers to the Internet world his works without any reservation of rights or fees. In effect, much like a contract, the copyright owner is the *Master of his Offering* and if it provides no limitation on copying, then appropriately, *de minimis non curat lex*.

Customarily, Respondent attempts to gain distance by mentioning that Petitioner placed the mast of West Haven University on the front of the

Content Guides. There was testimony by an employee that there was a misunderstanding as to what he was to do when he was instructed to "label" the Content Guides for the licensing authority. Irrespective, adding a name is not copyright infringement. Additionally, Excelsior lost its false designation of origin claim.

B. The Due Process principle should apply irrespective of the law's origin

This Honorable Court is requested to address an issue of extreme national importance wherein there are no bright lines regarding award limits other than those set by Congress in the form of a statutory *minima* and *maxima*. This allows courts (juries), upon a finding of "willful" copyright infringement to ratchet up the damage award to $150,000 for each work infringed.

Perhaps, the greatest need is parameters a jury (courts) can use in determining whether a particular act is "willful" in the context of an infringement claim. Until this is done, "willful" infringement will mean anything the jury thinks it means, and the damage award may depend more on the doer than his deeds.

The facts surrounding the infringement claim against Petitioner were discussed in the previous section. For the single submission of three Content Guides to the licensing authority and to no other point, the jury awarded $450,000 ($150,000 per

work submitted). This is a 150,000 to 0, punitive to compensatory damage ratio.

Just in this case alone, three interpretations of "willful" emerged:

District Court:

Although the court granted Respondent summary judgment on its claims related to the Content Guides, it left the finding of "willful" infringement to the jury. Jury Instruction 11 set a very low threshold for a finding of infringement:

> Infringement was willful when the Defendants engaged in acts that infringed the copyrights, and knew that those actions **may** infringe the copyrights." [Emphasis added].

Ninth Circuit:

> [T]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.

Bankruptcy Appellate Panel for the Ninth Circuit:

Petitioner sought to discharge the damage award from the infringement claim relative to the Content Guides in his Chapter 7 bankruptcy

petition, which was opposed by Excelsior. The bankruptcy court ruled that the claim was not dischargeable as the act underpinning the infringement claim was "willful." The Ninth Circuit Bankruptcy Appellate Panel's ("9th BAP") confirmed the findings of the bankruptcy court and ruled that copyright infringement is a "categorically harmful activity." (For comparative purposes so is drunk driving resulting in the death of a person). The following is an excerpt from the decision which was provided to the Ninth Circuit by Respondent:

> [T]he jury's verdict that Frye committed a willful infringement of Excelsior's copyrights satisfies the willfulness prong under [11] § 523(a)(6). An injury is willful under that subsection if the debtor intends the consequences of his action. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) [See Charles M. Frye v. Excelsior College, CC-08-1055. Ninth Circuit Bankruptcy Appellate Panel's (2008).

Petitioner was only able to find one case in which a court identified a damage award as being unreasonable. The remainder did not disrupt the award as long as it was within the *minima* and *maxima* permitted under 17 U.S.C. § 504.

> Undoubtedly assessed statutory damages should bear some relation to actual damages suffered." *RSO Records, Inc. v. Peri*, 596 F.

Supp. 849, 864, 225 U.S.P.Q. 407, 417 (S.D.N.Y. 1984).

C. RULE 34 DOES NOT REQUIRE COPIES

Federal Rules of Civil Procedure ("Rule") 26 and 34 do not require the responding party to provide actual copies of documents, but rather requires them to be made available for inspection and copying. [See *Federal Civil Procedures Before Trial* (The Rutter Group – 2002 p. 11-77, 11:139) "The initial disclosure of documents need not produce the actual documents, nor must it contain an itemized listing of each exhibit"]. [See Rule 26, (a) (1) (b), Advisory Committee Note to 1992 Amendment to Fed. R. Civ. P.).

1. Duty To Make Disclosure Pursuant to Rule 26:

Under Rule 26 (a)(1) "a party has a duty to make initial disclosures *** without waiting for discovery..."

2. Duty To Supplement Disclosure: Rule 26 (e)(1):

"A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in

some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court.'"

3. Duty To Make Available For Inspection:

A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, ***(A) any designated documents..."

4. Sanctions Under Rule 37(c)(1):

"If a party fails to provide information*** as required by Rule 26(a) or 26(e), the party is not allowed to use that information ***to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

5. District Court Rule 37 Sanction:

During formal discovery Petitioner served copies of over 8,000 documents and was deposed for three days. Additionally; he provided all the required documents pursuant to the First and Second Request for Production and specifically the one served in March 2005 as admitted by David Peter Miranda, lead counsel for Excelsior

("Attorney Miranda") on June 28, 2005 at a Motion to Compel Hearing:

The Court: Well wait. Let me ask - - let me ask you a question. With respect to the documents that you just referenced, why they weren't provided before the deposition, what was the triggering event that caused them or should have caused them to be produced before the deposition?

Miranda: The - - well, the first and second request of production of documents was the triggering event for the bulk of them.

The Court: **So the documents that were produced** at the deposition were the same documents you requested in the first and **second request for production** in December of '04 and March of '05?

Miranda: **They were**... (Emphasis added).

Although the magistrate essentially denied Excelsior's motion to compel, wanting to insure any dispute regarding the identification of documents was put to rest, he ordered each party to make a list of what was requested in a production demand

and what was received. Upon comparison of the lists, the parties would:

> "create a third separate list itemizing all documents not yet provided to Plaintiff, if any. Defendants shall then produce any such documents, subject
>
> to any privileges asserted, within ten days after the meet and confer."

Judge Papas also served notice to parties to bring to his attention any disagreements.

> "If any dispute arises with regard to any aspect of the procedures, the parties are directed to contact the Court immediately." (Emphasis Added).

As ordered by Judge Papas, lists of documents were exchanged between parties as reflected in the letter from Kenneth C. Simonian, *Esq.*, corporate defendants' counsel, to Attorney Miranda:

> In accordance with Judge Papas' Order dated August 4, 2005, below is a listing of all documents which are responsive to the specifically identified requests within Excelsior's Second Request for Production... Please consider this as a supplement to the formal Response of Defendant Frye served April 14, 2005..., With regards to the books

> and other reference materials identified in paragraph 1(a) above, my suggestion is that you...inspect the materials at Defendant Fryc's office at a mutually agreeable time.

Although Excelsior admitted to Judge Papas that all documents from the Second Request for

Production had been provided, over one year later it informed the Hon. District Court Judge William Q. Hayes it had not received a *single* document in response to the discovery requests. The following demonstrate the claims were the same and false:

- To Magistrate Papas in Motion to Compel:

  All documents or materials used in the creation of Defendants Nursing Concepts "Test Tips", "Power Points. (Second Request for Production, March 2005).

- To Judge Hayes in Motion in Limine:

  "All documents or materials used in the creation of Defendants Nursing Concepts "Test Tips", "Power Points." (Miranda's Declaration Exhibit "C") [September 2006].

As a result of the deception, all the documents on the list provided pursuant to Judge Papas' order were stricken. It is worth noting, Judge Papas was

well within his rights to order the list to be drafted and exchanged. [*See* Fed. R. Civil Procedure 26(e)(1), [a] party who has made a disclosure under Rule 26(a) ***must supplement*** (B) as ordered by the court."].

Notably, Excelsior did not take Judge Papas up on the offer to wit: "If any dispute arises with regard to any aspect of the procedures, the parties are directed to contact the Court immediately." (Emphasis Added). Therefore, it was absolutely inappropriate for Excelsior (through Attorney Miranda) to claim to Judge Hayes that the documents were not produced relative to the First and Second Request for Production in view of the fact that lists were compiled and exchanged per Judge Papas' order.

The striking of the documents a week before trial was nothing short of devastating and capricious. Judge Hayes gave no weight to the fact that the list of documents had been exchanged "[a]s ordered by the court." (October 26, 2006 hearing 6 days before trial) relative to the Motion in *Limine* ." [See Rule 26(e)(1)(B)]:

The Court:	The Books – What Books? I mean have they been given to counsel?
Mr. Simonian:	They've been identified for counsel pursuant to Judge

	Papas' order some time ago. They were identified for counsel ...
The Court:	That's not going to make them admissible...
The Court:	I'm not going to let you introduce your library...
Mr. Frye:	No I want to use 12 books, your honor... how are we are going to prove our case, your honor?
The Court:	Counsel - - Mr. Frye, it's not for me to tell you how to prove your case...
Mr. Frye:	Nowhere in Federal Rules am I required to give him a book. Nowhere in there is that. It says in there he has to come look. He chose to be in New York.

On October 26, 2006, the district court issued a Rule 37 sanction striking all the books and exhibits identified on the list which was prepared and exchanged pursuant to the August 5, 2005 order of Judge Papas.

The Ninth Circuit's order contrast even with the district court's order and ignores the events

that transpired.

> We conclude that the district court did not abuse its discretion in excluding Frye's 400 library books because they were not timely disclosed prior to Frye's April 2005 deposition. As such, the district court did not abuse its discretion in excluding Trial Exhibit O1, which had substantial material from the excluded library books.

The Ninth Circuit mentioned "disclose" and the district court mentioned provide a copy. According to Attorney Miranda all books pursuant to First and Second Request for Production had been provided, followed by the supplement as ordered by the magistrate. Therefore, Petitioner had fully complied with discovery requests. Additionally there is no rule that says any exhibit has to be disclosed prior to deposition. What drives party's discovery obligations is Rule 26 and Rule 34 that results from serving discovery devices.

D. FRAUD UPON THE COURT INVOLVES UNCONSCIONABLE PLAN OR SCHEME TO IMPROPERLY INFLUENCE THE COURT

After losing thirty claims to defendants (below), Respondent altered the direction of the case by falsely claiming that it protected its' examinations as trade secrets by requiring over 100,000 test takers a year, prior to being exposed to its trade secrets, to sign a "Nondisclosure Agreement." It did

this through sworn testimony of two witnesses and the placement of the contrived document (Trial Exhibit 64) on the overhead projector for viewing by the jury. In the immediate post trial phase, to defeat a motion for a new trial, Respondent and its counsel lauded the testimony of the employee witnesses as being "impeccably honest and true." In the Appellee Brief, Respondent (and the same counsel as signor) admitted to the wrongdoing:

> Defendant Frye's issue on appeal requires a finding that the district court abused its discretion in failing to find that the introduction of, and testimony regarding Excelsior College's Academic Honesty Policy ("Policy") and nondisclosure agreement constituted "clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct" that prevented Defendant Frye "from fully and fairly presenting his case or defense."

What is not mentioned by Excelsior is that the district court was deceived into believing that the Nondisclosure Agreement had been in use for an extended period of time (14 years). What makes the situation even worse, Excelsior's own in-house counsel (but not attorney of record), sat through the entire trial and even read testimony into the record, but did not advise the court of the deception being carried out against defendants, though he had, as an officer of the court, an affirmative duty to do so.

> These undisputed facts reveal that Thompson, through Bartlett [Thompson's in-house counsel but not counsel of record], engaged in a scheme to defraud the jury, the court, and [Defendant], *** through the presentation of fraudulent evidence, and the failure to correct the false impression created by [a witness]. The end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court. Cf. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322. U.S. 238, 245-46, 250 (1944) [Pumphrey v. KW Thompson Tool Co. (9th Cir. 1995) 62 F3d 1128, 1133].

E. ACTS OF DECEPTION

1. To demonstrate the degree of harm Respondent, under Attorney Miranda's signature, was willing to inflict, it used the fabricated Nondisclosure Agreement to gain a preliminary injunction against Petitioner.

2. Attorney Miranda falsely claimed in the pretrial brief that test takers had to agree not to release Excelsior's trade secrets:

> Students taking an Excelsior College examination are required to agree that they will not disclose the content of the examination.

3. Attorney Miranda committed a continuing

act of fraud by securing Judge Hayes' signature on a pretrial order that he knew contained erroneous information supplanted by him, to wit:

> ¶219 (In part) Students taking an Excelsior College examination are required to agree that they will not disclose the content of the examination. (Emphasis added).
>
> ¶ 238: All test takers must agree to abide by the terms of the Academic Honesty Policy ("Honesty Policy") before taking an examination.

4. Attorney Miranda committed a continuing act of fraud by introducing Trial Exhibit 64 through Bridgett Nettleton and placing it on the overhead projector for viewing by the jury and solicited false testimony from her as to its utility when he knew the testimony was false:

> Q. (by Mr. Miranda) Showing you what has been Marked as Exhibit Number 54 -- 64. I'm sorry. Exhibit Number 64. Can you tell me, Dr. Nettleton, what that is?
> A. It's the Academic Honesty Policy and a Nondisclosure agreement that the students sign that they understand the Academic Honesty Policy and that they will abide by it, and then there's a place for their signature.
> Q. Can you tell me Dr. Nettleton, when the

Excelsior College Academic Policy went into effect?

A. It has been in effect as long as I've been with the college.

Q. And how long has that been?

A. **14 years**. (Emphasis added)

5. Attorney Miranda did not intervene when Nettleton continued to give perjured testimony in response to cross examination questions although he had a legal obligation to do so.

Q: (by Mr. Frye) Dr. Nettleton, you said that if a student took a pencil and paper test, the academic policy was on that examination, is that correct?

A: Not on the examination. Before they get to the examination, they have to agree to the Academic Honesty Policy.

Q: When would that happen?

A: While they're in the exam process. A student would come to the examination center and have their identity validated, and then they would be required to sign something like this, the exhibit 64, which is the Academic Honesty Policy, prior to beginning the actual examination itself. So this would be completed before they began the exam. (Emphasis added).

Q: And when did that signature policy go into effect?

A: To my knowledge, it's always been in effect for as long as I've been with the college.

6. Attorney Miranda continued the deception and process with Dr. Patrick Jones:

Q. (Mr. Miranda): Dr. Jones, I'm showing you what has been marked as Exhibit No. 64, can you tell me what that document is, Dr. Jones?

A. Yes, that's the nondisclosure agreement for Excelsior College examinations which students and test takers are required to execute before gaining access to an examination.

7. In the post trial phase it was discovered that Dr. Jones had signed the introductory letter in a catalog entitled, *Excelsior College Examinations A Guide for Test Preparation and Registration* Containing the following notice thereby demonstrating his knowledge of falsity of his testimony:

Academic Honesty Nondisclosure Statement

Beginning April 2003 all test takers must agree to abide by the terms of the Academic Honesty Policy before taking the examination. The **non disclosure agreement** will be presented on a separate form enclosed with your examination booklet or printed inside the front cover of the examination booklet. This **Nondisclosure**

> **Agreement** must be read and signed prior to breaking the seal on the examination booklet." (Bold in original).

And finally: This notice established there was no signature requirement on a Nondisclosure Agreement until April 2003, A fact Excelsior doesn't deny now that it has judgment in hand:

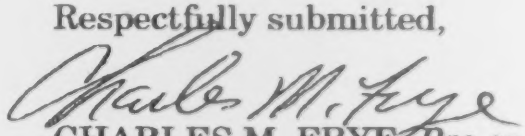
> Defendant Frye fails to set forth how the introduction of [contrived] evidence regarding Excelsior College's [Nondisclosure Agreement] prevented him from fully and fairly presenting his case. (Apellee Brief p. 31).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

February 19, 2010

Respectfully submitted,



CHARLES M. FRYE, *Pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EXCELSIOR COLLEGE,	)	
	)	
Plaintiff,	)	CASE NO.
vs.	)	04CV0535 WQH
	)	
CHARLES M. FRYE;	)	
PROFESSIONAL	)	
DEVELOPMENT	)	FINAL
SYSTEMS SCHOOL OF	)	JUDGMENT
HEALTH SCIENCES, a	)	AND
California Corporation; and	)	PERMANENT
WEST HAVEN	)	INJUNCTION
UNIVERSITY, Inc.,	)	
	)	
Defendants.	)	

Hayes, Judge:

The above-entitled action was instituted by Plaintiff Excelsior College ("Excelsior College") on February 20, 2003, against the Defendants Charles M. Frye, Professional Development Systems School of Health Sciences, and West Haven University, Inc. The issues were tried to a jury and the jury rendered its verdict on November 14, 2006. Pursuant to the orders of this Court and the verdict of the jury:

IT IS ORDERED, ADJUDGED AND DECREED THAT

Judgment is rendered on **Counts I-III** in favor of the Plaintiff Excelsior College and against Defendant Charles M. Frye and Defendant West Haven University, Inc. for willful copyright infringement of Excelsior College's copyrighted Content Guides.

Plaintiff Excelsior College is entitled to recover an award of damages from Defendant Charles M. Frye and Defendant West Haven University, Inc., joint and several, in the amount of Four Hundred Fifty Thousand Dollars ($450,000.00), representing the sum of the following:

Count I – Statutory damages for willful copyright infringement of U.S. Copyright Registration No. TX5-121-364 in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

Count II – Statutory damages for willful copyright infringement of U.S. Copyright Registration No, TX5-126-945 in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

Count III - Statutory damages for willful copyright infringement of U.S. Copyright

Registration No, TX5-121-365, in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

Judgment is rendered on **Count IV** in favor of the Plaintiff Excelsior College and against the Defendant Charles M. Frye and Professional Development Systems School of Health Sciences for copyright infringement of the following seven (7) Excelsior College Examinations:

a. Excelsior College Examinations, October 1, 2002 Administration, U.S. Copyright Reg. No. TX-5-637-617,

b. ACT PEP: Regents College Examinations, February 8, 1996 Administration, U.S. Copyright Reg. No. TX-4-276-214,

c. ACT PEP: Regents College Examinations, October 3, 1996 Administration, U.S. Copyright Reg. No. TX-4-442-168;

d. ACT PEP: Regents College Examinations, February 6, 1997 Administration, U.S. Copyright Reg. No. TX-4-539-630;

e. Regents College Examinations, October 1, 1997 Administration, U.S. Copyright Reg. No. TX-4-677-540;

f. ACT PEP: Regents College Examinations, September 29, 1997 Administration, U.S. Copyright Reg. No. TX-4-677-541; and

g. Regents College Examinations, October 1, 1999 Administration, U.S. Copyright Reg. No. TX-5-117-309.

and judgment is rendered on **Count VI** in favor of the Plaintiff Excelsior College and against Defendant Charles M. Frye and Defendant Professional Development Systems School of Health Sciences for trade secret Misappropriation. Plaintiff Excelsior College is entitled to recover an award of damages from Defendant Charles M. Frye and Defendant Professional Development Systems School of Health Sciences, as follows:

Count IV – Actual damages in the amount of Six Hundred Ninety-Three Thousand Five Hundred Eighty-Eight Dollars ($693,588.00) against defendant Charles M. Frye and Defendant Professional Development Systems School of Health Sciences, joint and several, and profits of Three Million Five Hundred Thousand Four Hundred Eighty-One Dollars and seventy cents $3,500,481.70) against Defendant Charles M. Frye.

Count VI - Punitive damages against Defendant Charles M. Frye in the amount of One Million Eighty-Two Thousand One Hundred and One Dollars ($1,082,101.00), and punitive damages against Defendant Professional Development Systems School of Health Sciences in the amount of One Million Four Hundred Forty-Seven Thousand

Seven Hundred Thirty-Three Dollars ($1,447,733.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

Plaintiff Excelsior College is entitled to recover pre-judgment interest pursuant to 28 U.S.C. §1961(a), on the amount of Six Hundred Ninety-Three Thousand Five Hundred Eighty-Eight Dollars ($693,588.00) against Defendant Charles M. Frye and Defendant Professional Development Systems School of Health Sciences, joint and several, at a rate of 5.00% per annum, from the date of Plaintiff Excelsior College's commencement of this action on February 20, 2003, through February 20, 2007, for total interest in the amount of One Hundred Thirty-Eight Thousand Seven Hundred Seventeen Dollars and sixty cents ($138,717.60), and from Defendant Charles M. Frye on Three Million Five Hundred Thousand Four Hundred Eighty-One Dollars and seventy cents ($3,500,481.70), at a rate of 5.00% per annum, from the date of Plaintiff Excelsior College's commencement of this action on February 20, 2003, through February 20, 2007, for total interest in the amount of Seven Hundred Thousand Ninety-Six Dollars and thirty-two cents ($700,096.32).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

Based upon the above, final judgment in total damages is awarded to Excelsior College as follows:

Counts I, II, and III: Four Hundred Fifty Thousand Dollars ($450,000.00) against Defendant Charles M. Frye and Defendant West Haven University, Inc., joint and several liability;

Count IV: Six Hundred Ninety-Three Thousand Five Hundred Eighty-Eight Dollars ($693,588.00) plus interest in the amount of One Hundred Thirty-Eight Thousand Seven Hundred Seventeen Dollars and sixty cents ($138,717.60), for total judgment of Eight Hundred Thirty-Two Thousand Three Hundred Five Dollars and sixty cents ($832,305.60) against Defendant Charles M. Frye and Defendant Professional Development Systems School of Health Sciences, joint and several liability, and Three Million Five Hundred Thousand Four Hundred Eighty-One Dollars and seventy cents ($3,500,481.70) plus interest in the amount of Seven Hundred Thousand Ninety-Six Dollars and thirty-two cents ($700,096.32) for total judgment of Four Million Two Hundred Thousand Five Hundred Seventy-Eight Dollars and two cents ($4,200,578.02) against Defendant Charles M. Frye;

Count VI: One Million Eighty-Two Thousand One Hundred One Dollars ($1,082,101.00) against Defendant Charles M. Frye and One Million Four Hundred Forty-Seven Thousand Seven Hundred Thirty-Three Dollars ($1,447,733.00) against Defendant Professional Development Systems School of Health Sciences.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

Judgment be granted in favor of Plaintiff Excelsior College and against Defendants Charles M. Frye, West Haven University, Inc. and Professional Development Systems School of Health Sciences in an amount to be determined by this court, based upon the following additional sums:

1) Plaintiff Excelsior College is the prevailing party on all claims of copyright infringement, and Plaintiff is entitled to an award of costs and attorney's fees pursuant to 17 U.S.C. §505, in an amount to be determined upon receipt of Plaintiff's supporting papers, and after consideration of Defendants' objections.

2) Other taxable costs and disbursements incurred by Plaintiff, as the prevailing party, in an amount to be determined upon receipt of a Bill of Costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

1) Pursuant to the Copyright Act, 17 U.S.C. §502(a), Defendants Charles M. Frye, Professional Development Systems School of Health Sciences, West Haven University, Inc., and their stockholders, officers, directors, agents, servants, employees, or affiliates thereof, representatives and attorneys, and all persons acting or attempting to act in concert or participation with them are permanently enjoined and restrained from any and all use of Excelsior College copyrights, trade secrets and other proprietary materials as further set forth herein;

2) Defendants Charles M. Frye and Professional Development Systems School of Health Sciences are permanently enjoined from, either directly or indirectly:

(A) infringing in any manner Excelsior College copyrighted works and specifically from printing, publishing, delivering, distributing, selling, transferring, copying, duplicating, reproducing, offering, displaying, marketing, transferring or communicating in any manner, orally or in written, printed, audio, photographic, electronic, or other form, any Excelsior College copyrighted Nursing Concepts Examination or any Excelsior College copyrighted Content Guide, or any materials derived from any Excelsior College

copyrighted works, including but not limited to the following:

a. Excelsior College Examinations, October 1, 2002 Administration, U.S. Copyright Reg. No. TX-5-637-617;

b. ACT PEP: Regents College Examinations, February 8, 1996 Administration, U.S. Copyright Reg. No. TX-4-276-214;

c. ACT PEP: Regents College Examinations, October 3, 1996 Administration, U.S. Copyright Reg. No. TX-4-442-168;

d. ACT PEP: Regents College Examinations, February 6, 1997 Administration, U.S. Copyright Reg. No. TX-4-539-630;

e. Regents College Examinations, October 1, 1997 Administration, U.S. Copyright Reg. No. TX-4-677-540;

f. ACT PEP; Regents College Examinations, September 29, 1997 Administration, U.S. Copyright Reg. No. TX-4-677-541;

g. Regents College Examinations, October 1, 1999 Administration, U.S. Copyright Reg. No. TX-S-117-309;

h. Health Support A: Health Promotion and Health Protection Content Guide (Baccalaureate Level). U.S. Copyright Registration No. TX5-121-364;

i. Health Restoration: Area II Content Guide (Baccalaureate Level). U.S. Copyright Registration No. TX5-126-945; and

j. Health Support B: Community Health Nursing Content Guide (Baccalaureate Level). U.S. Copyright Registration No. TX5-121-365.

(B) Preparing derivative questions based on and Excelsior College copyrighted works;

(C) Debriefing or otherwise intentionally or knowingly obtaining from any person, questions or answers from any Excelsior College Nursing Concepts exam;

(D) Compiling, or attempting to compile, any Excelsior College examination questions and/or answers identified herein or in any existing or future Excelsior College examinations;

(E) Assisting, aiding, or abetting any other person or business entity engaging or performing any of the enjoined activities referred to in paragraphs (A)-(D) above.

3) Defendants Charles M. Frye and Professional Development Systems School of Health Sciences are permanently enjoined from using, acquiring or attempting to acquire, directly or indirectly any materials containing trade secrets or proprietary materials of Excelsior College, including but not limited to Excelsior College examination questions or answers or any materials derived from any Excelsior College examination questions or answers.

The Clerk is directed to forward copies of this Order to all counsel of record and to enter

judgment for the Plaintiff Excelsior College, pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DATED: March 23, 2007

/s/ William Q. Hayes
WILLIAM Q. HAYES
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EXCELSIOR COLLEGE,	)	
Plaintiff,	)	CASE NO.
vs.	)	04CV0535 WQH
CHARLES M. FRYE; PROFESSIONAL DEVELOPMENT SYSTEMS SCHOOL OF HEALTH SCIENCES, a California Corporation; and WEST HAVEN UNIVERSITY, Inc.,	)	ORDER
Defendants.	)	

Hayes, Judge:

The matters before the Court are: 1) the motion for new trial (#396) filed by Defendant Charles M. Frye, 2) the motion to reduce damage award and for other relief (#398) filed by Defendant Charles M. Frye, and 3) the motion for a new trial (#423) filed by Defendant Professional Development Systems School of Health Sciences.

BACKGROUND

On November 14, 2006, the jury rendered its verdict against the Defendants Charles M. Frye, and Professional Development Systems School of Health Sciences and in favor of Plaintiff Excelsior. (Doc. # 368).

On March 23, 2007, this Court entered a "Final Judgment and Permanent Injunction" awarding damages against Defendant Charles M. Frye and Defendant West Haven University on Counts I, II, and III for copyright infringement; against Defendants Charles M. Frye and Professional Development Systems School of Health Sciences on Count IV and VI for copyright infringement and trade secret misappropriation. (Doc. # 417)

Defendant Charles Frye moves the Court for a new trial on the grounds that 1) Plaintiff engaged in unfair litigation strategies, 2) Plaintiff misled the Court and gained a major evidence sanction, and 3) the verdict in favor of Plaintiff was against the clear weight of the evidence. In addition, Defendant Charles Frye moves the Court to reduce the damage award and to enter judgment as a matter of law on Counts I II and III.

Defendant Professional Development Systems School of Health Sciences moves the Court for a new trial on the claims for copyright infringement and the claim for trade secret misappropriation on

the grounds that Plaintiff failed to prove any infringement and failed to sufficiently protect its trade secrets.

Plaintiff asserts that there are no facts to support a new trial. Plaintiff contends that the evidence at trial was sufficient to support the verdict of the jury and the amount of damages awarded by the jury.

RULING OF THE COURT

A district court may grant a motion for new trial, even when a verdict is supported by substantial evidence, if "the verdict is contrary to the clear weight of evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999); *accord Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

The Court finds that there was substantial evidence presented at trial to support the verdict of the jury and the damages awarded by the jury. Defendants have failed to raise any grounds that would support a new trial. All of the pretrial issues raised by Defendants in support of the motion for new trial were fully and fairly litigated prior to trial and there are no grounds to reconsider any prior orders. The Court finds the verdict of the jury

in this case was supported by the weight of the evidence and there are no facts or law which would indicate that the jury reached an erroneous verdict.

IT IS HEREBY ORDERED that 1) the motion for new trial (#396) filed by Defendant Charles M. Frye is DENIED, 2) the motion to reduce damage award and for other relief (#398) filed by Defendant Charles M. Frye is DENIED, and 3) the motion for a new trial (#423) filed by Defendant Professional Development Systems School of Health Sciences is DENIED.

DATED: June 14, 2007

/s/ William Q. Hayes
WILLIAM Q. HAYES
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXCELSIOR COLLEGE, Plaintiff - Appellee,	)	No. 07-55997 DC No. 04CV0535 WQH
vs.	)	
CHARLES M. FRYE; Appellant – Defendant	)	
AND	)	MEMORANDUM *
PROFESSIONAL DEVELOPMENT SYSTEMS SCHOOL OF HEALTH SCIENCES; et al., Defendants.	)	

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted April 20, 2009**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BEEZER, HALL and T.G. NELSON, Circuit Judges.

Defendant Charles M. Frye appeals several aspects of the district court's judgment against him following a jury trial on Plaintiff Excelsior College's ("Excelsior") claims of copyright infringement and trade secret misappropriation.

We have jurisdiction under 28 U.S.C. § 1291. We conclude that the district court properly granted partial summary judgment in favor of Excelsior and did not abuse its discretion in ruling on the post-trial and pre-trial motions now challenged by Frye. We affirm.

The facts of the case are known to the parties, and we do not repeat them below.

Frye argues that the district court erred in granting partial summary judgment on Excelsior's three claims of copyright infringement of its content guides. We review the district court's grant of summary judgment de novo. *SeeEnlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004). We agree with the district court's thorough analysis of Frye's

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

defenses in its May 8, 2006, order. The district court properly granted summary judgment after rejecting Frye's defenses of merger, fair use, implied license and unclean hands.

Frye argues that the district court abused its discretion in excluding some of Frye's evidence and not excluding some of Excelsior's evidence. A district court's evidentiary rulings are "reviewed for abuse of discretion, and the appellant is additionally required to establish that the error was prejudicial." *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). We conclude that the district court did not abuse its discretion in excluding Frye's 400 library books because they were not timely disclosed prior to Frye's April 2005 deposition. As such, the district court did not abuse its discretion in excluding Trial Exhibit O1, which had substantial material from the excluded library books. We also conclude that the district court did not abuse its discretion in refusing to sanction Excelsior after a discovery dispute regarding its "Item Writers."

Frye relies on *punitive* damages jurisprudence to argue that the district court abused its discretion in denying his motion to reduce the jury's award of maximum *statutory* damages. We conclude that the district court did not abuse its discretion in declining to reduce the jury's award of statutory damages. *See Columbia Pictures Television, Inc. v. Krypton Broad. of*

Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001) ("[T]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima." (quotation omitted)).

Frye argues that the district court abused its discretion in denying his motion to reduce the jury's award of Frye's profits. The district court did not abuse its discretion in declining to reduce the jury's award because Frye failed to meet his burden of establishing his deductible expenses. *See* 17 U.S.C. § 504(b); *Eales v.Envtl. Lifestyles, Inc.*, 958 F.2d 876, 881 (9th Cir. 1992) ("Any doubt as to the correctness of the profit calculation should . . . be resolved in favor of the plaintiff."), *abrogated on other grounds by Hunt v. Pasternack*, 192 F.3d 877 (9th Cir. 1999). We reject Frye's argument that the jury's award of profits was already "taken into account in computing the actual damages." *See* 17 U.S.C. § 504(b). The actual damages constituted Excelsior's cost of rewriting its examinations and were independent of Frye's profits.

Frye argues that the district court's permanent injunction is too broad because it enjoins lawful activity. "The scope of injunctive relief is reviewed for abuse of discretion." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002). The district court did not abuse its discretion in crafting a broad injunction after Frye was found liable for *willful* copyright infringement

and trade secret misappropriation. *See Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 937 (9th Cir. 2004) (upholding an "extraordinarily broad prohibition" when justified by "past egregious conduct").

Frye argues that the district court abused its discretion in denying his motion for a new trial based on evidence Frye discovered after trial. Frye fails to meet his burden of showing that he "could not have discovered the evidence sooner through the exercise of reasonable diligence, and that the new evidence is of such magnitude that it would likely have changed the outcome of the case." *See Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 998 (9th Cir. 2001). We also reject Frye's argument that a new trial is warranted based on the conduct of Excelsior's counsel. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002) ("[W]e will not overrule a district court's ruling about the impact of counsel's alleged misconduct unless we have a definite and firm conviction that the court committed a clear error of judgment." (internal quotation marks omitted)).

To the extent Frye argues that the jury's verdict is not supported by substantial evidence, we disagree. *See Watec Co. v. Liu*, 403 F.3d 645, 651

n.5 (9th Cir. 2005) ("A jury's verdict must be upheld if supported by substantial evidence.").

AFFIRMED.

(No signature on Document)

FILED
SEP 1, 2009
MOLLY C. DWYER, CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXCELSIOR COLLEGE, Plaintiff - Appellee,	) No. 07-55997) DC No. 04CV0535 WQH
vs.	) Southern District of California, San
CHARLES M. FRYE; Appellant – Defendant	) Diego
AND	) ORDER
PROFESSIONAL DEVELOPMENT SYSTEMS SCHOOL OF HEALTH SCIENCES; et al., Defendants.	)

Before: BEEZER, HALL and T.G. NELSON, Circuit Judges.

Defendant-appellant Charles Frye's petition for panel rehearing is **DENIED**.

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FILED
SEP 22 2009

MOLLY C. DWYER, CLERK